Federal Communications Commission

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting

Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers

2012 Biennial Review of Telecommunications Regulations

WT Docket No. 13-238

WC Docket No. 11-59

RM-11688 (terminated)

WT Docket No. 13-32

COMMENTS OF THE CITY OF PHOENIX, ARIZONA ON NOTICE OF PROPOSED RULEMAKING

1) The City of Phoenix Arizona agrees with and strongly supports the comments submitted by the Intergovernmental Advisory Committee ("IAC") dated December 2, 2013. The IAC's comments express many of the City's concerns.

The Commission's proposed one-size-fits-all rules fail to recognize the varying circumstances of each cell site. Looking only at the right-of-way ("ROW"), there is no uniformity with respect to ownership, control or location. Although Phoenix owns the streets within the original townsite as a result of an 1874 federal land patent granted to the City, the City has grown more than a hundredfold since then and most of the ROW is subject to restrictions imposed by the provisions of the documents dedicating the land to ROW use. There is no single way that ROW is dedicated.

3) The ROW in a residential district demands different considerations from a commercial district or a rural area. Just as few would argue that a large macrocell site would not be appropriate in the ROW in front of the White House or on the Capitol Mall, most homeowners would resist a macrocell site adjacent to their homes. Phoenix has witnessed the wrath of homeowners who have seen unwanted cell towers erected in their neighborhoods. Even if new FCC rules were to override local land use controls, City residents would still look to the City to refuse approval of unreasonable site requests. For the most part, local control has been maintained in this context up until now in recognition of the importance of local control over land use decisions where local officials are directly answerable to those most

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affected. Local land use control should be preserved.

4) States and localities should not be required to approve a "modification" of an existing tower or base station that does not conform to a condition or restriction that was imposed in the original approval. While there are undoubtedly exceptions that prove the rule, the conditions or restrictions on any approval have a rational purpose and basis. The reasons arise from the local conditions applicable to the particular site, although they may apply in varying degrees to many other sites. It defies logic to require approval of a modification of a "stealth" site that renders the site non-stealth. It makes no difference whether the conditions on a site were imposed before or after the effective date of Section 6409(a), since the effective date did not change the character or conditions of a particular site. [See Paragraph 127 of WT Docket No. 13-238]

5) Some commercial and governmental buildings are recognized historic landmarks. While a stealth antenna might be appropriate for an historic building, an expansion of a stealth site might well destroy the historic appearance of the building. It would be inappropriate to mandate approval of that sort of expansion.

6) Phoenix already has entered into agreements with cellular carriers and cell

- Phoenix already has entered into agreements with cellular carriers and cell antenna hosting businesses, and is currently in active negotiations with several others, to allow cell sites both within the ROW, and on City-owned property. Phoenix recognizes the necessity of improved wireless communications and actively promotes antenna siting wherever appropriate. This does not extend to permitting sites anywhere and everywhere without some oversight. Phoenix does not unreasonably delay consideration and action on applications for new antenna sites. Most delays are attributable to negotiations over the terms of the individual agreements. To minimize those delays, Phoenix has prepared form agreements, but even there, the various companies do not present the same requests and demands so that negotiations are invariably required. Currently the parties negotiate on a reasonably level playing field, and the proposed rules would significantly alter that balance in an unreasonable and unfair way. To require approval of modifications of an original installation without regard to the conditions that were imposed on the initial approval would most assuredly create disincentives for any initial site approval, whether the site is within the ROW or elsewhere. [id.] Otherwise, the approving authority would have to consider anything that might result later after approval of a site since the initial approval would result in a complete loss of any subsequent control. That the question is raised suggests at least a misunderstanding of, if not a lack of touch with, state and local government responsibilities and conduct.
- 7) With all due respect, the Chairman's comments to the pending NPRM fail to recognize that a major reason for the roadblocks to wireless broadband is the enormous capital requirements involved. Phoenix has a population of nearly 1.5 million people spread over nearly 520 square miles, with thousands of miles of freeways and streets. While there has recently been some increased interest in deploying cellular antennas and ground stations, service providers have not been clamoring to construct large numbers of new facilities in the City. The Great Recession seems to have had more to do with broadband development than anything else as companies held back on the required major investments waiting for economic recovery. Recent discussions have only extended to modest proposals for a few new sites. Discussions with those who have come forward indicate that the service providers lack the resources and that, together with uncertain demand, is holding back major expansion. The NPRM focuses on the false premise that major regulatory reform will bring forth sudden new interest and investment capital in cellular expansion. See also the failure of wireless carriers to permit collocation on their towers in paragraph 20 below.

8) Phoenix has patterned its process for approval of sites in the ROW after that of the City of Scottsdale, Arizona, and even has attempted to improve on and streamline that process. The service providers appear to be cherry picking the most lucrative markets for investment. The regulatory costs of site selection and approval are greatly dwarfed by the costs of the cable, hardware and related construction costs of new sites.

9) The thrust of the Commission's proposed rules fails to give proper deference

9) The thrust of the Commission's proposed rules fails to give proper deference to the origins and purposes of local zoning and land use controls. Zoning imposes restrictions on the use of property by its owner for the good of all property owners. It minimizes the negative impact that a particular use might have on the surrounding properties. Just as a gasoline filling station might have a negative Page 2

impact on surrounding properties in a residential district, so might a cell tower have a similar impact. Zoning has been generally accepted as a reasonable limitation on the freedom to do with one's property as one might wish for the good of all. The limitation being that the use of property does not impose an unwanted and

unreasonable impact on the neighboring properties.

10) For the most part, wireless telecommunications service is a business and profits are necessary to viability. However, in many situations, the optimal site and design are inconsistent with other local needs, including, notably, aesthetics. Although it may cost more to disguise a tower and base station in a stealth site than to build an undisguised site, stealth sites are routinely constructed in areas where ordinary sites would not be welcomed. Too little attention in the NPRM has been given to the problems that unfettered expansion of stealth sites create.

11) The City has seen the number of comments posted on behalf of Adirondack Park in New York, and agrees with their concern for preserving the scenic beauty of the park. Similarly, Phoenix wishes to preserve the scenic views its residents have of

the surrounding mountains and its skyline.

12) The request in Paragraph 37 to exempt collocations on "other structures" stretches the meaning of collocation beyond all reason. In the context of wireless facilities, collocation has meant to apply to the location of facilities of different carriers together in one place. The proposed language would consider any sort of existing structure as eligible for the placement of wireless facilities. In other words, they want "collocation" and "location" to be synonymous, which they are not in normal usage.

13) Beginning with Paragraph 102, the Commission seeks comments on the interpretation or definition of terms including "wireless" tower or base station, "existing wireless tower or base station" and "collocation."

14) Paragraph 104 asks: "What about a tower that is not yet used for any

service?" This needs to be considered in conjunction with the definitions discussed

in Paragraphs 107, 108 and 111.

15) Paragraph 107 cites the Collocation Agreement for the definition of "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." This is a common sense definition that Phoenix urges the Commission to adopt, if it is to adopt any definition. It encompasses both antennas and related base stations so as to be virtually synonymous with "wireless tower or base station." This is also in response to the request in Paragraph 108 to comment on alternative and more expansive interpretation. Paragraph 108 to comment on alternative and more expansive interpretation.

16) Paragraph 108 requests comments on the types of structures that may be considered a "wireless tower or base station," and suggests that "many other types of structures, from buildings and water towers to streetlights and utility poles, may also support antennas or other base station equipment. The Bureau proposes to interpret wireless tower or base station to include almost any other structure imaginable "even if they were not built for the sole or primary purpose of providing such support." This interpretation goes beyond the ordinary meaning of the words and is not only bad practice, but unnecessary. This would strip away the control of local authorities over their own assets and place it in the hands of the wireless industry. The proposed interpretation completely ignores the purpose of constructing existing government-owned structures in the first place, as well as ignoring any distinction between structures in the ROW for traffic control purposes from ordinary municipal buildings that are not in the ROW. It provides no balance of the competing interests of the local government with that of the wireless industry. Phoenix and many surrounding municipalities have been encouraging wireless siting for several years and have already made great strides to accommodate the reasonable requests of wireless service providers and there is no reason to expect that will not continue. Our experience has been that faster development of wireless service has been held back by reluctance to invest on the part of the wireless service providers. There has been no indication that regulatory reform would have made any difference and so

there is no need for the federal government to intervene.

17) The City concurs with the IAC interpretation in Paragraph 109.

18) Phoenix agrees with the Commission's observation in Paragraph 98 that there are benefits to offering governments additional opportunity and flexibility to develop solutions that best meet the needs of their communities consistent with the requirements of Section 6409(a). This opportunity would permit development and clarification of the issues that may be best addressed through rule making. The

resulting experience could expose weaknesses in the current regulatory scheme and point not only to areas that should be addressed, but also how those areas might be best addressed.

19) Phoenix agrees with the definition of "existing wireless tower or base station" given by the Bureau in Paragraph 111 to include only a structure that "currently" supports or houses transmission equipment. Verizon attempts to stretch beyond reason the common meaning of "existing" to include structures that do not currently house wireless communications equipment. Verizon's definition would rewrite the statute to say, in effect, that wireless communications equipment must be permitted on any government-owned structure, anywhere, anytime. That is not a reasonable interpretation of Section 6409(a), and the Commission should reject it. Not only does Verizon's proposed interpretation strip "existing" of any real meaning, but it would expand the definition of "collocation" to the point of meaninglessness. In negotiations with wireless carriers for cell siting, it has always been understood that collocation means locating wireless antennas of one carrier on the same tower as another carrier, and locating the related base equipment in a common location. Placing an antenna on a streetlight or municipal building where there is no other wireless equipment has never been referred to as collocation in Phoenix's experience.

The Commission should encourage, or even require, wireless service providers to permit collocation of antennas of competitors on their towers and to permit shared use of ground space for the related base equipment. As an example of the significance this issue, in a recent siting case in Phoenix, a wireless service provider sought a land use permit to add a second cell tower on private property. The property already has one cell tower controlled by a competing wireless service provider through a long-term lease. Although the City and nearby residents of the proposed cell tower expressed the desire that the wireless service provider collocate its antenna on the existing cell tower, the wireless service provider testified under oath that collocation is not possible, because its competitor who controls the existing tower refuses to even discuss a collocation agreement. This confirms an issue that City staff has been told informally in communications with wireless service providers on other occasions. The City encourages that sort of cooperation among wireless service providers in its zoning code. However, collocation remains the rare exception to the general rule of each having their own individual sites on City property. That is clearly an impediment to the siting process that the Commission needs to address.

The above example also involved the fact that the tower was in a designated "special planning district" because it has a "unique scenic desert foothill environment." There are all sorts of similar conditions that undoubtedly exist in every community. The Commission's proposed interpretations completely ignore that. Some flexibility needs to be built into the siting process to accommodate local

conditions and needs.

With regard to defining "substantial increase" or "substantial change" in Paragraphs 115 through 120, there are problems with both stealth and small sites and stepwise increases in size. Paragraph 120 aptly points out that successive "insubstantial" increases could more than double the size of a site. That would allow an end run around the intent of Section 6409(a) to require approval of only substantial changes, rendering the statutory limitation meaningless. Courts routinely reject statutory interpretations that render the language of a statute meaningless. Therefore, it should matter whether there were previous modifications, regardless of when made.

Similarly, the proposed interpretation would permit a site originally approved as a stealth site to expand with the placement of antennas or equipment Phoenix strongly agrees with the IAC's observations in that is not disguised. Paragraph 122, as well as the comments in footnote 253. Any one-size-fits-all solution cannot work satisfactorily in all circumstances. That is the reason that local land use controls have, for the most part, been preserved thus far. Footnote 253 provides a good example of an unobtrusive monopole morphing into a multi-pronged, unsightly structure. That does not serve the needs and desires of the local community who have to live with such structures. What would constitute a "substantial change" in "physical dimensions" is very dependent on the qualities of the particular tower and its surroundings. For example, the addition of an array of antennas on an existing tower that already has an exposed antenna array might not be

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a substantial change, although the addition of the same array to a commercial sign that hid a tower might be quite substantial, particularly if it borders on a residential district. Similarly, the addition of an antenna on a stealth streetlight pole might not be "substantial," although it would be if the streetlight pole was not engineered to withstand the additional weight, and adding the antenna would create a safety hazard.

Phoenix has not allowed the installation of antennas on its streetlight poles because those poles were not engineered either to withstand the additional weight, or to accommodate the additional cabling. Phoenix has, however, permitted its streetlight poles to be swapped out with poles that have been sufficiently

engineered for the task, and are otherwise aesthetically appropriate. It is not necessary to go through the mental gymnastics of deciding whether to define the replacement pole as an "existing" pole.

25) Phoenix already approves virtually all applications for wireless siting in non-residential areas, and utilizes an approach that involves the local community in the negotiations over siting and design of specific sites in residential districts. Many of the surrounding communities have similar processes for approving wireless siting. This has not imposed any unreasonable burden or delay in siting. It has met the needs of the service providers while addressing legitimate local concerns. Phoenix urges the Commission to recognize that local concerns, including aesthetics,

must be taken into account for this effort to be successful.

26) Regarding Paragraph 123, Section 6409(a) does leave State and local governments with the discretion to deny or condition approval of a facilities request. The statutory reference to "eligible facilities" is one place where local discretion may be exercised. A reasonable interpretation must give some meaning to "eligible," and to allow local authorities to have the discretion to determine eligibility would give the term meaning. It is not a reasonable reading of the statute that local authorities would be required to permit a large macrocell site to either be erected, or to evolve through a series of "insubstantial" modifications, on an otherwise quiet residential street. Eligible facilities should not be defined to include structures that do not meet building and safety code requirements. Broadband deployment is important, but not to the point of sacrificing the safety and welfare of the general public.

27) Further, although Section 6409(a) explicitly creates an exception to Section

704 of the Telecommunications Act of 1996, it does not mention the provisions of Section 253 of the same act that preserves local control over their ROW. Presumably Congress was aware of Section 253, but chose not to amend it when it passed Section 6409(a). The Commission should not extend its reach to completely preempt local land

use controls.

28) With respect to paragraph 124, local authorities should be permitted to deny a covered request to the extent of requiring compliance with otherwise applicable building codes and land use laws, including modifications that do not conform to a condition or restriction imposed in the original approval of a site that has legal, non-conforming use status. Local authorities should, at a minimum, be permitted to enforce health and safety codes in placing conditions on, or requiring modification of, covered requests. Furthermore, the Commission should not usurp the power of local authorities to control their property as property owners apart from any restrictions on them as land use regulators, thereby discouraging local investment in infrastructure. In response to Paragraph 128, yes, a tower that is a legal but non-conforming use should not be considered "existing" for purposes of considering expansion under Section 6409(a). Controlling non-conforming use is an important facet of local land use regulation.

29) In response to Paragraph 125, the principles of federalism do require the Commission to construe Section 6409(a) in a manner that preserves traditional State and local land use authority. Supreme Court Justice Hugo Black wrote that federalism

means:

"a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." (Younger v. Harris, 401 U.S. 37, 44, 91 S. Ct. 746, 750, 27 L. Ed. 2d 669 [1971])

30) Regulating and setting local land use policy has a long tradition as the Page 5

function of State and local government. The Commission's proposed rules interpreting Section 6409(a) so as to preempt local building and land use laws would interject the Commission deeply into local land use policy and regulation inconsistent with recognized notions of federalism. It would be the highly inappropriate for the Commission to require approval of a tower that did not meet load-bearing limits and therefore presented a safety hazard. A limitation on statutory interpretation is that the interpretation must be reasonable, and there is no evidence here of intent to override safety. Safety concerns have always been given paramount consideration, and this is no place to compromise safety. Summary

The Commission should respect well established principles of federalism and the long tradition of deference to State and local land use regulation. The Commission should not attempt to place itself in the position of super zoning authority, a position for which it neither has the expertise, nor the resources. Section 6409(a) should be interpreted very narrowly, and in the best way possible for it to withstand judicial scrutiny. Many of the proposals for interpretation do not meet that standard. Phoenix urges careful consideration of the consequences of the Commission's actions. Respectfully submitted, OFFICE OF THE CITY ATTORNEY DANIEL L. BROWN, Acting City Attorney

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